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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Case No. 74-725

PHYLLIS MORETTI, ROSENELL SUSI, MAE DIANA,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, OHIO

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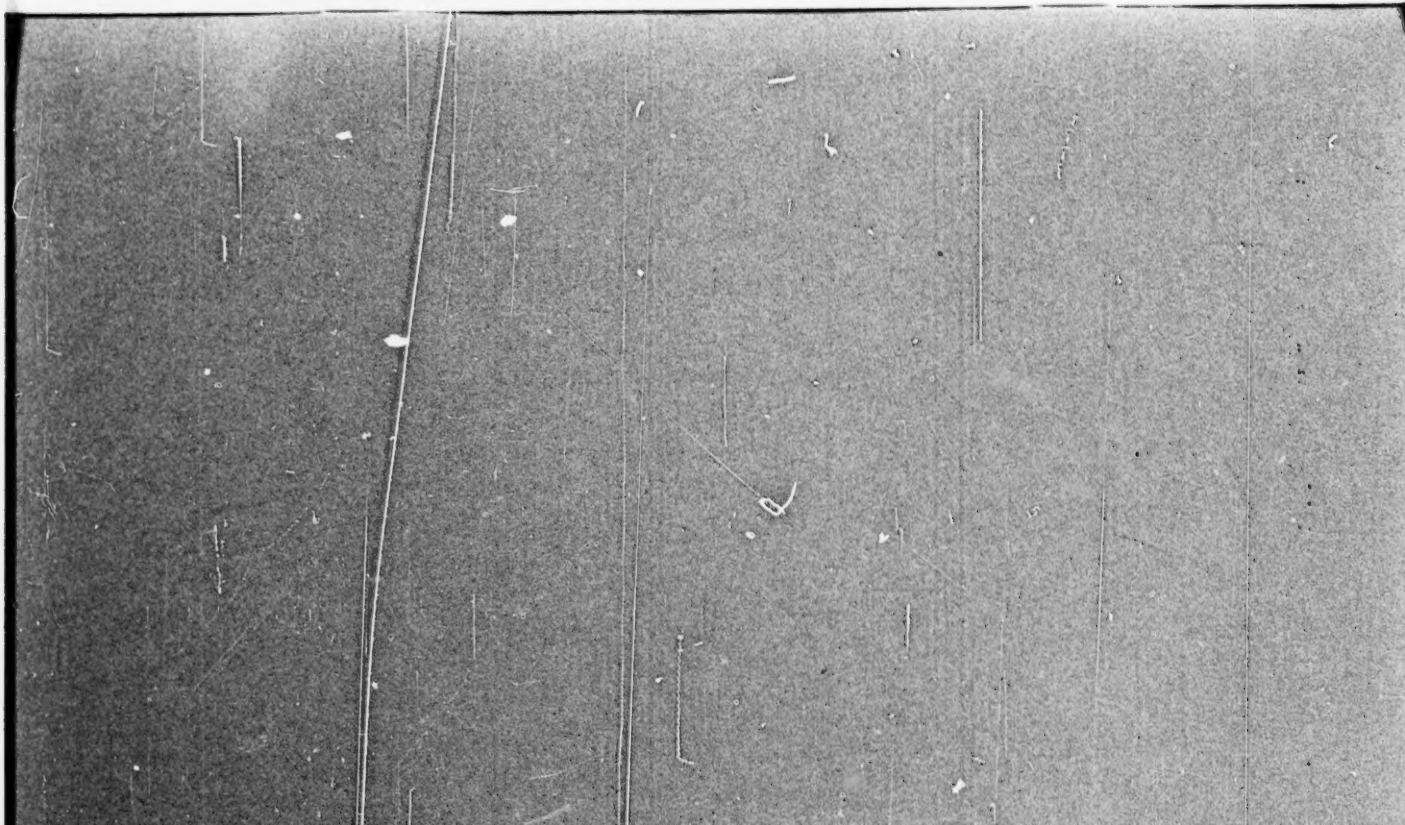

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Case No.

PHYLLIS MORETTI, ROSENELL SUSI,
MAE DIANA,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, OHIO

The petitioners Phyllis Moretti, Rosenell Susi and Mae Diana pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Tenth Appellate District entered in this proceeding on April 25, 1974. The Supreme Court of Ohio dismissed petitioners' appeal from the Court of Appeals for Franklin County without hearing on September 12, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not reported, appears in the Appendix hereto. No opinion was rendered by the Municipal Court of Franklin County, Ohio, but a partial transcript appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals, Tenth Appellate District, Franklin County, Ohio, was entered on

April 25, 1974. A timely appeal to the Supreme Court of Ohio was dismissed upon September 12, 1974, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

When a police officer seizes property pursuant to a search warrant but fails to comply with his express statutory duty to return the search warrant accompanied by a written, verified inventory of any property taken, has that officer conducted an unreasonable search within the purview of the Fourth and Fourteenth Amendments to the Constitution of the United States, making the property seized subject to the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV, Constitution of the United States

The right of the people to be secure in their persons, houses, papers and effects, against the unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV, Section 1, Constitution of the United States

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person within its jurisdiction the equal protection of the laws.

Section 2933.241, Ohio Revised Code (Page, 1953)

> The officer taking property under a warrant for search shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken and shall be verified by the officer. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

STATEMENT OF THE CASE

On March 23, 1973, the Municipal Court for Franklin County, Ohio issued search warrants to the Columbus Division of Police for the search of "the person of Rosenell Susi", "the person of Mae Diana", "the person of Phyllis Moretti and her 1971 Pontiac . . . or any other vehicle she may occupy". Pursuant to these warrants, certain items were seized but when the warrants were returned to the Clerk's Office of the Municipal Court they were unaccompanied by any verified inventory in violation of Ohio Revised Code Section 2933.241 (set forth above).

At the time of the execution of the warrant, appellants were arrested and charged with promoting a lot-

tery or scheme of chance. A motion to suppress the use of the items as evidence was timely filed. The trial court ruled that "the filing of a verified inventory with return of the warrant was a mandatory requirement of the statute and failure to file such verified inventory rendered the search warrant invalid and the evidence thereby secured rendered inadmissible in court".

The prosecutor certified to the Tenth District Court of Appeals for Franklin County, Ohio, that the granting of the motion had rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution had been destroyed and appealed the decision upon the motion to that court.

The listed assignment of error was "The trial court erred in ruling that the requirements of Revised Code Section 2933.241 were mandatory instead of ministerial". The Court of Appeals reversed the decision of the trial court, noting that the real contention of the state was "The failure of a police officer to follow the requirements of Revised Code Section 2933.241 is not in and of itself grounds to exclude evidence".

Petitioners then appealed to the Supreme Court of Ohio, setting forth as their proposition of law a statement substantially identical to that set forth above. The illegality and constitutional impermissability of the search had been argued in the lower courts. On September 12, 1974, the appeal was dismissed for the stated reason that "no substantial constitutional question exists herein".

REASONS FOR GRANTING THE WRIT

1. UNITED STATES COURTS OF APPEALS, AS WELL AS OTHER APPELLATE COURTS, ARE IN CONFLICT UPON THE RAMIFICATION OF FAILURE TO COMPLY WITH A STATUTORY MANDATE TO MAKE A PROPER RETURN OF WARRANT.

Ohio Revised Code §2933.241 closely parallels 18 U.S.C., Rule 41 (d) in its requirement that officers executing a search warrant must inventory the property seized and return a verified copy of the inventory with the warrant and any property seized. Our research on the ramification of a failure to comply with the statute indicates that the United States Courts of Appeals are not in agreement. One line of cases in the Sixth Circuit, finds that the return of a verified inventory is a "ministerial act", and the failure to perform the act leads only to a suit in tort. See, for instance *Rose v. U.S.*, 274 F. 245 (C.C.A. Ohio 1921) and *Evans v. U.S.*, 242 F.2d 534 (6th C.C.A. 1957). Another line of cases in the First Circuit holds that the failure to comply renders the evidence inadmissible at trial. See *Giles v. U.S.*, 284 F. 208 (C.C.A.N.H. 1922) and *Murby v. U.S.*, 293 F. 849 (C.C.A.R.I. 1922).

The only reported case in Ohio reaches a conclusion opposite to that in the present case. *State v. Bowland*, 29 Ohio Misc. 1976 (Toledo Muni. 1971) held the evidence inadmissible. A similar result was reached by the New Mexico Court of Appeals in *State v. Montoya*, 14 Cr. L. 2506 (1974), the court reaching its decision upon Fourth and Fifth Amendment grounds.

Thus, the appellate courts, both state and federal, are far from agreement upon this issue.

2. THIS DECISION PRESENTS SIGNIFICANT AND RECURRING PROBLEMS.

Each day literally thousands of search warrants are served nationwide. On a certain percentage of these warrants the executing officers make an error, willful or innocent, and forget or fail to comply with the statutory duty to make a proper return of the warrant and to file a verified inventory of the items seized. Because the legal ramifications of that failure are unclear, defense counsel is morally obligated to contest the validity of the seizure. The time spent by the judiciary, law enforcement officials, prosecutorial staff and defense counsel on the issue nationwide thus is enormous. Therefore, the frequency with which this problem is encountered makes the problem worthy of this Court's attention.

Further, the inherent importance of the values protected by the Fourth Amendment militate for the significance of this problem. As this Court stated over thirty years ago in *Sgro v. United States*, 287 U.S. 206 (1932):

> The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process should be liberally construed in favor of the individual.

In the present case such legislation and the Fourth Amendment were not so construed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals, Tenth Appellate District, Franklin County, Ohio.

Respectfully submitted
TYACK, SCOTT & COLLEY

BY: Thomas M. Tyack

THOMAS M. TYACK
Attorneys for Petitioners
536 South High Street
Columbus, Ohio 43215
221-1341 (614)

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 1974, three copies of the Petition for Writ of Certiorari were personally delivered to the office of James J. Hughes, Jr., City Attorney for Columbus, Ohio, and Counsel for the Respondent, at 120 West Gay Street, Columbus, Ohio. I further certify that all parties required to be served have been served.

TYACK, SCOTT & COLLEY

BY: Thomas M. Tyack

THOMAS M. TYACK
Attorneys for Petitioners
536 South High Street
Columbus, Ohio 43215
221-1341 (614)

APPENDIX A
THE SUPREME COURT OF OHIO

1974 TERM
To wit: September 12, 1974

No. 74-566

APPEAL FROM THE COURT OF APPEALS
for FRANKLIN County

THE STATE OF OHIO,)
City of Columbus.)

STATE OF OHIO,

Appellee,

vs.

PHYLLIS MORETTI ET AL.,

Appellants.

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19 ....

..... Clerk

..... Deputy

APPENDIX B
IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 73AP-440

STATE OF OHIO,
Plaintiff-Appellant,
v.
PHYLLIS A. MORETTI,
Defendant-Appellee.

No. 73AP-441

STATE OF OHIO,
Plaintiff-Appellant,
v.
ROSENELL M. SUSI,
Defendant-Appellee.

No. 73AP-442

STATE OF OHIO,
Plaintiff-Appellant,
v.
MAE M. DIANA,
Defendant-Appellee.

DECISION

Rendered on April 9, 1974

MR. JAMES J. HUGHES, JR., City Attorney,
MR. DANIEL W. JOHNSON, City Prosecutor,
MR. LARRY GARLINGER, Assistant,
City Hall,
Columbus, Ohio,
For Plaintiff-Appellant State of Ohio.
TYACK, SCOTT & COLLEY,

MR. THOMAS M. TYACK,
536 South High Street,
Columbus, Ohio,
and

MR. MICHAEL McGINLEY,
16 East Broad Street,
Columbus, Ohio,
For Defendants-Appellees Phyllis A. Moretti, Rosenell M. Susi and Mae M. Diana.

WHITESIDE, J.

These are appeals from an order of the Franklin County Municipal Court sustaining defendant's motion to suppress certain evidence seized pursuant to a search warrant because of a failure of the officers executing the warrant to file an inventory pursuant to R. C. 2933.241. These cases were heard together in the trial court and in this court.

The transcript of proceedings in this case is incomplete, but it is supplemented by a statement in lieu of the transcript, approved by the trial court, indicating the proceedings. This statement states in pertinent part that:

"* * *.

"It was ascertained that the police officers who had applied for the search warrant and executed the warrant, filled in the portion of the search warrants entitled 'Return of Warrant' and left the executed search warrants in the custody of the Clerk of the Franklin County Municipal Court. It was further ascertained, stipulated and agreed to that there was no separate written and verified inventory filed in this case.

"* * *.

> "Thereupon, the court ruled that the filing of a verified inventory with the return of the warrant was a mandatory requirement of the statute and failure to file such verified inventory rendered the search warrant invalid and the evidence thereby secured rendered inadmissible in court."

The state filed timely notices of appeal together with the certificate of the prosecutor, required by Crim. R. 12(J), that the granting of the motion had rendered the state's proof so weak that any reasonable possibility of effective prosecution had been destroyed. By its single assignment of error, the state contends that "The trial court erred in ruling that the requirements of Revised Code Section 2933.241 were mandatory instead of ministerial." However, the brief and argument indicate that the true issue raised by the state is the contention set forth on page 5 of its brief that "The failure of a police officer to follow the requirements of Revised Code Section 2933.241 is not in and of itself grounds to exclude evidence."

Crim. R. 41 (D) contains virtually identical provisions to those set forth in R. C. 2933.241. However, since the search occurred and the motion to suppress was filed prior to the effective date of the Criminal Rules (although the decision of the trial court was rendered subsequent thereto), we shall refer to R. C. 2933.241 rather than Crim. R. 41 (D). R. C. 2933.241 provides as follows:

> "The officer taking property under a warrant for search shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory

> shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken and shall be verified by the officer. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant."

Essentially, the issue before us is as to the effect upon the admissibility of evidence seized pursuant to a search warrant where there has been a failure to comply with the requirement of R. C. 2933.241 that the return of the search warrant "shall be accompanied by a written inventory of any property taken." The only reported Ohio decision directly in point appears to be that of the Toledo Municipal Court in *State v. Bowland* (1971), 29 Ohio Misc. 176. In that case, there appears to have been an inventory, but it was not verified by the officer as required by R. C. 2933.241. That court sustained a motion to suppress. However, although the case carefully analyzes the provisions of R. C. 2933.241, and the purposes thereof, it contains no discussion as to why a per se exclusionary rule should be judicially imposed for a violation of R. C. 2933.241. The statute contains no exclusionary provision. In our unreported decision rendered in *State v. Southall*, Nos. 71-229 and 71-230, Court of Appeals for Franklin County, November 30, 1971 (1971 Decisions pages 2447 to 2455), this court considered whether noncompliance with the R. C. 2933.241 requirement for giving a receipt for property taken would invalidate an otherwise valid search and seizure. We held that it did not and that the evidence was not to be

excluded because of noncompliance with that provision of R. C. 2933.241.

In *State v. Johnson* (1960), 112 Ohio App. 124, the Court of Appeals for Cuyahoga County had before it the question of whether evidence should be excluded because of noncompliance with R. C. 2933.26 relative to handling of seized property. Although probably dictum, Judge Guernsey stated at page 137: "* * * the statute does not purport to affect their competency in evidence, but merely purports to provide for the preservation of the evidence until trial." Similarly, R. C. 2933.241 does not purport to affect competency of evidence seized.

Courts from other jurisdictions have considered the failure to comply with statutory requirements concerning the steps to be taken after a search warrant has been served and evidence seized thereunder. In *People v. Hawthorne* (1970), 45 Ill. 2d 176, 258 N. E. 2d 319, the Illinois Supreme Court stated at page 322:

> "* * * Since it has been held that failure to comply with statutory requirements concerning the steps to be taken after the warrant has been served does not render the search warrant or the search conducted pursuant thereto invalid, the defendant's contention cannot be sustained. People v. York, 29 Ill. 2d 68, 71, 193 N.E. 2d 773; People v. Guston, 338 Ill. 52, 169 N.E. 822."

In *United States v. Wilson* (1971), 451 F. 2d 209, the Fifth Circuit Court of Appeals stated at page 214 that:

> "Defendant also objects to the evidence because there was a failure to return and file the warrant. Any such defect is ministerial and does not affect the validity of the search. * * *"

Similarly, the Sixth Circuit Court of Appeals in

United States v. Haskins (1965), 345 F. 2d 111, stated at page 117:

> "And finally, defendant argues that the return on one of the search warrants was erroneous. Assuming that to be true, the return of a warrant is a ministerial act and any failure therein does not void the warrant. * * *"

The effect of a failure to file an inventory was considered by the Supreme Court of Oregon in *State v. Cortman* (1968), 446 P. 2d 681, wherein it is stated at page 683:

> "Finally, the defendant argues that the search was rendered illegal by the failure of the officers, after the fact, to comply with ORS 141.130. Since the search was conducted under a warrant valid on its face, and since we have held that the search itself was reasonable, a good search was not made bad by the failure of the officers thereafter to make a prompt inventory and return. See Rose v. United States, 274 F. 245, 250-251 (6th Cir. 1921). While the requirement of a prompt return is no doubt a valuable safeguard of the property rights of individuals, these rights can be protected without resort to the automatic invocation of the exclusionary rule. The privacy of the individual, which is protected by the Fourth Amendment, has already been invaded by the time the inventory-and-return statute becomes relevant. The exclusion of trustworthy evidence that has lawfully come into the possession of the government would penalize society without serving a constitutional purpose. * * *"

The duty of a police officer imposed by R. C. 2933.241 and Crim. R. 41 (D) to file a written inventory of property taken with his return of a search warrant is a ministerial duty. Unfortunately, as indicated by the assignment of error, there has been some confusion, and the

equation of a ministerial duty with a directory duty. However, this is not the case. Ministerial duty is defined in *Bouvier's Law Dictionary* is not the case. Ministerial duty is defined in *Bouvier's Law Dictionary* (L-Z), Third Revision, Vol. II, page 2219, as follows:

> "MINISTERIAL DUTY. One in respect to which nothing is left to discretion. A simple definite duty, arising under conditions admitted or proved to exist, and imposed by law, the performance of which may, in proper cases, be required of the head of a department by judicial process."

Thus, a ministerial duty is an absolute, certain and imperative duty imposed by law upon a public officer involving merely execution of a specific duty arising from fixed and designated facts. As such, ministerial duties are necessarily mandatory when required to be performed.

There are several purposes served by the making and filing of an inventory of property seized pursuant to a search warrant. First, it avoids subsequent disputes as to what was seized. It permits ready ascertainment that the property seized was the property described in the search warrant. It protects the owner of the property by making a clear record of the property seized so that later return to the owner may be accomplished if proper. It protects the police officer conducting the search from claims that he seized property which he did not seize. It serves as a link in the chain of evidence to verify the identity of the property seized.

However, the requirement of an inventory is a statutory, not a constitutional, requirement. Defendants make no contention that, even in the absence of the statutory requirement of an inventory, the search was in any way in violation of any constitutional provision. In other

words, from the record before us, we must assume that the search warrant was properly issued, properly executed and that the property was properly seized so that the search and seizure was not in violation of the constitutional prohibition against unlawful searches and seizures and was in accordance with the constitutional requirements for search warrants.

Thus, the question is whether a failure of a police officer to file the inventory will vitiate an otherwise lawful search and seizure pursuant to a search warrant. There is no statutory, or constitutional, exclusionary rule requiring exclusion of evidence lawfully seized pursuant to a search warrant because of the failure of a police officer to file an inventory thereof. Nor do we think that such an exclusionary rule should be judicially imposed. To impose such an exclusionary rule would be an unwarranted extension of the exclusionary rule imposed for violations of the constitutional prohibition against unlawful searches and seizures.

In this instance, there is a lawful search and seizure, but the complaint is that there was a failure to comply with a subsequent related requirement which does not constitute part of the search and seizure but is to be performed only once the search and seizure is completed. We do not condone the failure of the police officer to perform his statutory duty. However, there is no reason to penalize the public because of the failure of a police officer to perform this type of duty. There is no prejudice to the defendant that is inherent in the failure of the officer to file an inventory. Unlike the case of an unlawful search and seizure in violation of constitutional safeguards, the failure of an officer to file an inventory does not violate any fundamental rights of the defendants.

The failure of the officer to file an inventory may give

rise to problems concerning admissibility of evidence if a question arises as to the identity of the property seized pursuant to a search warrant, but a per se exclusionary rule is neither required nor warranted. The purpose of the per se exclusionary rule imposed, with respect to illegally obtained evidence, is to discourage the obtaining of evidence by unlawful means. The old rule permitting illegally obtained evidence to be used against a defendant at trial has been described as placing "a judicial stamp of approval on the use of unlawful means to justify an end result." See dissenting opinion of Justice Herbert in *State v. Mapp* (1960), 170 Ohio St. 427, 438.

Here, there is no unlawfully obtained evidence. The evidence was lawfully obtained, and the question is whether the state should be denied the use of such lawfully obtained evidence because of the failure of a police officer to comply with a statutory requirement in connection with the identification and preservation of such lawfully obtained evidence. No reason for imposing such a per se exclusionary rule has been advanced. Most of the cases refuse to do so, and we do likewise.

For the foregoing reasons, the assignment of error is sustained, and the order of the Franklin County Municipal Court suppressing the evidence is reversed and vacated, and this cause is remanded to that court for further proceedings in accordance with law consistent with this decision.

Order reversed and remanded.

TROOP, P. J., and STRAUSBAUGH, J., concur.

APPENDIX C
IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO
No. 73AP-441

STATE OF OHIO,
Plaintiff-Appellant,

vs.

ROSENELL M. SUSI,
Defendant-Appellee.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on April 9, 1974, the assignment of error is sustained, and it is the judgment and order of this court that the order of the Franklin County Municipal Court suppressing the evidence is reversed and vacated, and this cause is remanded to that court for further proceedings in accordance with law consistent with said decision.

HORACE W. TROOP
DEAN STRAUSBAUGH
ALBA WHITESIDE
Judges

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 73AP-442

STATE OF OHIO,

Plaintiff-Appellant,

vs.

MAE M. DIANA,

Defendant-Appellee.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on April 9, 1974, the assignment of error is sustained, and it is the judgment and order of this court that the order of the Franklin County Municipal Court suppressing the evidence is reversed and vacated, and this cause is remanded to that court for further proceedings in accordance with law consistent with said decision.

HORACE W. TROOP
DEAN STRAUSBAUGH
ALBA WHITESIDE
Judges

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 73AP-440

STATE OF OHIO,
Plaintiff-Appellant,

vs.

PHYLLIS A. MORETTI,
Defendant-Appellee.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on April 9, 1974, the assignment of error is sustained, and it is the judgment and order of this court that the order of the Franklin County Municipal Court suppressing the evidence is reversed and vacated, and this cause is remanded to that court for further proceedings in accordance with law consistent with said decision.

HORACE W. TROOP
DEAN STRAUSBAUGH
ALBA WHITESIDE
Judges

APPENDIX D

IN THE FRANKLIN COUNTY MUNICIPAL COURT, COLUMBUS, OHIO CRIMINAL DIVISION

Case Nos. 9465, 9473 & 9474

STATE OF OHIO,

Plaintiff,

vs.

PHYLLIS MORETTI, ROSENELL SUSI and MAE DIANA

Defendants.

PARTIAL TRANSCRIPT OF PROCEEDINGS

HONORABLE SIDNEY GOLDEN, JUDGE, PRESIDING.

APPEARANCES:

JAMES J. HUGHES, JR., *City Attorney*
By: LARRY GARLINGER, *Ass't. City Prosecutor*
On behalf of the City.
MICHAEL COLLEY, *Attorney at Law*
Tyack, Scott and Colley
536 South High Street
Columbus, Ohio 43215
MICHAEL MCGINLEY, *Attorney at Law*
Weiner, Kippe and Cromley
171 East Livingston Avenue
Columbus, Ohio 43215
On behalf of the Defendants.

The foregoing is a partial narrative Bill of Exceptions

of a motion to suppress evidence hearing conducted before Judge Golden on November 8, 1973.

The recorded transcript reveals only the preliminary matters and the ultimate decision of the court and does not reveal the basic issues brought out by the attorneys for the defendants giving rise to the decision by the court.

Attorneys for the defendants represented and maintained that the Revised Code Section 2933.241 was controlling and dispositive of the above styled cases. That section is set forth as follows:

§2933.241 Inventory of property taken.

> The officer taking property under a warrant for search shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken and shall be verified by the officer. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

Jack Rogers, Chief Deputy Criminal Clerk for the Franklin County Municipal Court, was present pursuant to subpoena duces tecum for any and all records relating to this case. The records included a search warrant, a return of warrant, and further, those were the only re-

cords which the Clerk of Court's Office had relating to this case.

It was ascertained that the police officers who had applied for the search warrant and executed the warrant, filled in the portion of the search warrants entitled "Return of Warrant" and left the executed warrants in the custody of the Clerk of the Franklin County Municipal Court. It was further ascertained, stipulated and agreed to that there was no separate written and verified inventory filed in this case.

Attorneys for the defendants argued that Revised Code Section 2933.241 further requires that a separate inventory be filed with such search warrants and that such additional inventory be verified by the officer. They further argued that these were mandatory requirements of Revised Code Section 2933.241 and failure to file same with the search warrants rendered any evidence secured thereby inadmissible in court.

Cited as authority for their position was
v. decided by Judge Flowers of the Franklin County Court of Common Pleas in ,
197 , and *State v. Bowland*, 58 0.0. 477.

In light of the arguments and authority advanced by attorneys for the defendants, the court asked the prosecution whether it knew of any authority to the contrary. It was conceded by the prosecutor that he felt that the receipt for the property requirement of the statute was made mandatory by the *Bowland case, supra,* and that the other requirements of the statute relative to verified inventory might very well be mandatory as well.

Thereupon, the court ruled that the filing of a vertified inventory with the return of the warrant was a mandatory requirement of the statute and failure to file such verified inventory rendered the search warrant invalid

and the evidence thereby secured rendered inadmissible in court.

SIDNEY GOLDEN, *Judge*

MICHAEL COLLEY, *Attorney*
MICHAEL MCGINLEY, *Attorney*
LARRY GARLINGER, *Ass't. City Prosecutor*

APPENDIX E

November 25, 1974
Clerk, Court of Appeals
Tenth District
Franklin County, Ohio

Re: State of Ohio vs. Moretti/Susi/Diana
Case No. 73AP-440/441/442

Dear Sir:

The petitioners Moretti, Susi and Diana intend to file in the Supreme Court of the United States a petition for a writ of certiorari to review the opinion and judgment entered in the above-entitled proceeding.

The petitioners accordingly request that you prepare and certify, for transmission to the Clerk of the Supreme Court of the United States a copy of the entire record that was before the Court of Appeals for the Tenth Appellant District, Franklin County, Ohio, including the opinion and judgment of that Court.

Very truly yours,
Thomas M. Tyack

SUPREME COURT, U.S.

FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-[illegible]

Case No. [illegible]

PHYLLIS MORETTI, ROSEMELL SUSI, MAE DIANA,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Case No. 74-75

PHYLLIS MORETTI, ROSENELL SUSI, MAE DIANA,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below is included within the appendix of Petitioner's brief.

JURISDICTION

The jurisdictional requisites are set forth in Petitioner's petition.

QUESTION PRESENTED

Whether an exclusionary rule should be imposed upon an otherwise valid search and seizure where the verified inventory filing requirements of Ohio Revised Code §2933.241 have not been complied with by the police.

STATEMENT OF THE CASE

A motion to suppress evidence came on for hearing before Judge Sidney Golden of the Municipal Court of Franklin County, Ohio, on November 8, 1973. The defendants were charged with promoting a lottery or scheme of chance under Revised Code §2915.12. Part of the state's case was based upon certain physical evidence secured by virtue of search warrants executed at the time of arrest.

At the hearing it was developed that the search warrants were returned to the custody of the Clerk's Office of the Franklin County Municipal Court unaccompanied by any verified inventory.

In applying Revised Code §2933.241, the court ruled that the filing of a verified inventory with the return of warrant is a mandatory requirement of the statute and failure to file such verified inventory rendered the searches invalid and the evidence thereby secured inadmissible in court.

The motions to suppress were sustained and the hearing concluded.

The state filed timely notices of appeal together with the certificate of the prosecutor, required by Criminal Rule 12(J), that the granting of the motion had rendered the state's proof so weak that any reasonable possibility of effective prosecution had been destroyed.

On April 9, 1974, the Court of Appeals of Franklin County, Ohio, reversed and remanded the cases for trial.

The Petitioners filed Notice of Appeal to the Ohio Supreme Court. Petitioners moved for an order directing the Court of Appeals of Franklin County to certify its record and appealed as of right from the Court of Appeals. On September 12, 1974, The Ohio Supreme Court overruled the motion to certify and *sua sponte* dismissed the appeal for the reason that "no substantial constitutional question exists herein."

ARGUMENTS CONTRA ALLOWANCE OF WRIT

I. A Court of Appeals has not Rendered a Decision in Serious Conflict with the Decision of Another Court of Appeals on the Same Matter.

Ohio Revised Code §2933.241 is nearly identical to 18 U.S.C., Rule 41(d). They are set forth as follows:

O.R.C. §2933.241 Inventory of property taken.

> The officer taking property under a warrant for search shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken and shall be verified by the officer. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the the applicant for the warrant.

18 U.S.C.A., Rule 41(d), page 212:

> (d) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the

> applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken; and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

A significant case interpreting the Federal Rule is *U.S. v. Hooper,* 320 F. Supp. 507 (E.D. Term 1969), *affirmed,* 438 F. 2d 969 (6th Cir.), *cert. denied,* 400 U.S. 929 (1970). The *Hooper case, supra,* involved a failure by the government to give a receipt for property taken, failure to promptly file the return of warrant and, naturally, the failure to promptly file the inventory. The court ruled that such failures did not invalidate the search where a reasonable search had already been conducted and concluded before the occasion arose for the raiding officers to follow the prescribed procedures.

The Franklin County Court of Appeals in its decision pointed out its unreported case of *State v. Southall,* No's. 71-229 and 71-230 (see p. 12 of Petitioner's brief) which refused to adopt the exclusionary rule. It singled out *State v. Johnson,* 112 Ohio App. 124 from the Court of Appeals for Cuyahoga County (referred to on p. 13 of Petitioner's brief) to show the refusal of that court to exclude evidence where the inventory was not filed. The Franklin County Court of Appeals then cites and refers to numerous holdings, both state and federal, which refuse to so adopt the exclusionary rule. Only a small minority of the cases hold to the contrary.

II. The Decision Below is Clearly Correct; It Does Not Present Significant and Recurring Problems; and There is No Important Question of Federal Law.

It should be pointed out that Revised Code §2933.241

contains no exclusionary provision, nor does it purport to affect the competency of the evidence seized.

State v. Cortman (1968), 446 P. 2d 681 at page 683, points out that there has already been a lawful invasion of rights normally protected by the Fourth and Fourteenth Amendments and a defendant's rights are not prejudiced by an error or omission in failing to file an inventory. In such a case there is no unlawfully obtained evidence.

Clearly, the requirement of an inventory is a satutory and not a constitutional requirement.

CONCLUSION

By reason of the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CITY OF COLUMBUS, OHIO
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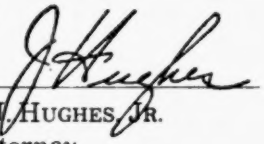
CERTIFICATE OF SERVICE

We hereby certify that on this 8th day of January, 1975, three copies of the foregoing Petition for Writ of Certiorari were mailed, postage pre-paid, to Thomas M. Tyack, Attorney for Petitioner, 536 South High Street, Columbus, Ohio, 43215. We further certify that all parties required to be served have been served.

BY: 

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